

# Chapter 222-23 WAC

## RIPARIAN OPEN SPACE PROGRAM

### WAC

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### WAC 222-23-010 Policy and definitions.

- (1) **Policy.** The legislature determined that it is in the public interest to acquire (by purchase or donation) an interest in lands within unconfined avulsing channel migration zones that are offered for acquisition by the landowner, and therefore established a riparian open space program in RCW 76.09.040 to be administered by the department. The purpose of the acquisition is to provide for ecological protection and fisheries enhancement. The department may acquire either the fee interest in or a permanent conservation easement over such lands. This chapter implements the riparian open space program.
- (2) **Definitions.** As used in this chapter, the following terms shall have the following meanings:
  - (a) “Qualifying CMZ land(s).” See WAC 222-23-020(1).
  - (b) An “unconfined avulsing channel migration zone” means the area within which the active channel of an unconfined avulsing stream is prone to move and where the movement would result in a potential near-term loss of riparian forest adjacent to the stream. Sizeable islands with productive timber may exist within the zone and are considered a part of the channel migration zone. The unconfined avulsing channel migration zone does not include areas that are permanently restricted from channel movement by a dike or levee.
  - (c) An “unconfined avulsing stream” is defined in WAC 222-16-010.

### WAC 222-23-020 Submitting and processing of applications for the riparian open space program.

- (1) **Qualifying CMZ land(s).** Lands that qualify for the riparian open space program are those lands located within an unconfined avulsing channel migration zone and are, as of the date an application is submitted to the department under this section, identified in records of the applicable county assessor as being classified or designated as forest land under chapter 84.33 RCW or as being subject to current use taxation as forest land under chapter 84.34 RCW. Qualifying CMZ lands may be placed in the riparian open space program whether they represent all or just a portion of the lands within the channel migration zone along a particular stream segment. That is, the lands to be placed in the program may include all of a landowner’s lands located within the channel migration zone up to the boundary between that zone and the RMZ core area, or lands to be included may include only a portion of a landowner’s lands within an unconfined avulsing channel migration zone of a given stream segment. Likewise, where more than one landowner owns land within the channel migration zone of a given stream segment, any landowner may elect to participate in the riparian open space program without regard to participation of neighboring landowners.

Land does not qualify for the riparian open space program where the department has determined that:

- (a) The lack of legal access to the land is likely to materially impair the department's ability to administer the riparian open space program with respect to the land;
  - (b) All persons having an interest of any description in the land, including, but not limited to, joint tenancy, tenancy in common, holder of easement, or holder of lien or security interest, have not agreed to convey or subordinate such interests to the state to the extent deemed necessary by the state to transfer the fee or easement free of or superior to any such interest;
  - (c) The land is subject to unacceptable liabilities as defined in WAC 222-23-20(4) [222-23-020(4)]; or
  - (d) There is any other circumstance making the land unsuitable for fisheries enhancement or ecological protection.
- (2) Application. An owner or owners of qualifying CMZ lands may apply to the department to place the lands within the riparian open space program. Applications for the riparian open space program may, at the landowners' option, be submitted at the same time as a forest practices application for adjoining or nearby forestlands, or may be submitted separately (and without reference to or the requirement of a current forest practices application). The application for the riparian open space program shall be in writing on a form provided by the department and shall contain the following information:
- (a) Name, address, and telephone number of applicant(s);
  - (b) Contact name and telephone number for questions concerning the application;
  - (c) Location and description of the land proposed for inclusion in the program, including estimated acreage, a description of the methods used by the landowner to determine that the land is qualifying CMZ land and a map showing the approximate boundary between the channel migration zone and the adjoining RMZ core area (and in situations where the latter is not applicable, a description of the process the landowner used to determine that the qualifying CMZ land is within an unconfined avulsing stream channel migration zone);
  - (d) Tax parcel identification number(s) that contain the qualifying CMZ land;
  - (e) List of all persons having any right or interest in the land covered by the application for the riparian open space program and a description of such right or interest;
  - (f) The stumpage value area and hauling zone in which the qualifying lands lie (see map at WAC 458-40-640).
  - (g) A map of the qualifying CMZ land;
  - (h) A statement indicating the landowner's desire to place the land covered by the application within the riparian open space program and whether the landowner wishes to convey the qualifying land in fee or convey only a conservation easement;
  - (i) Whether the landowner wishes to receive the statutory compensation for the conveyance or wishes to donate the qualifying CMZ land;
  - (j) Whether the landowner representative submitting the application is aware of the presence of any hazardous substances on the lands;
  - (k) Description and documentation of the legal and physical access to the land being acquired;
  - (l) The type of boundary description proposed by landowner (survey or other description); and
  - (m) Any other information DNR determines is necessary to assess whether the land qualifies for the riparian open space program.

- (3) Review and processing of application. Within ninety days of receipt of a complete and accurate application for the riparian open space program, the department shall preliminarily determine (and advise the applicant) whether lands proposed for the riparian open space program appear to meet the requirements of this chapter and of RCW 76.09.040 (3) and (4), and, if so, whether there is funding available for the purchase. This determination is subject to subsequent confirmation of all information required for the program and eligibility of the land as qualifying for the program. If the preliminary determination is that the land qualifies for the program and if funding is available for the proposed purchase, then the following shall occur within the ninety days following notice to the landowner of the preliminary determination:
- (a) The landowner, in cooperation with the department, shall delineate on the ground the boundary line between the CMZ and the RMZ core area; following which,
  - (b) The department shall verify the appropriateness of that delineation, determine the standards for the boundary description (i.e., a survey or other), make a final determination whether there are any unacceptable liabilities on the lands proposed for inclusion in the program, and communicate the foregoing to the landowner.  
If the department determines there are no unacceptable liabilities on the lands, the landowner shall mark the boundary (as verified) using tree tags or other long-term boundary marking methods specified by the department.
- (4) Unacceptable liabilities. As used in this section, unacceptable liabilities are created by the presence of hazardous substances on the qualifying CMZ lands or by other condition that creates such a liability to the department that may jeopardize the department's ability to maintain fisheries enhancement or the ecological protection of the qualifying CMZ lands, and with respect to which liability the applicant is unwilling or unable to provide reasonable indemnification to the department. If the department finds unacceptable liabilities with respect to qualifying CMZ lands, the department may reject the landowner's application.
- (5) Preparation of conveyance documents. Within ninety days following placement in the field of the long-term boundary between the CMZ and the RMZ core area as provided for in subsection (3) of this section, the following shall occur:
- (a) The landowner shall:
    - (i) Traverse the boundary to determine the acreage of the qualifying lands;
    - (ii) Either perform a legal land survey or otherwise document the boundaries consistent with the requirements of WAC 222-23-030(3), as applicable; and
    - (iii) Prepare a map of the qualifying CMZ lands suitable for recording.
  - (b) The department shall:
    - (i) Conduct and finalize a cruise of the timber on the qualifying CMZ lands;
    - (ii) Determine the statutory compensation to be paid to the landowner;
    - (iii) Prepare conveyance documents consistent with this chapter; and
    - (iv) Prepare any other documents necessary for closing and recording the conveyance, including without limitation a real estate excise tax affidavit.
- (6) **Timber cruise.** The timber cruise will be conducted by the department using a cruiser acceptable to the department and the landowner and using generally accepted cruise methodology and sampling intensity acceptable to both parties. The timber cruise shall measure all trees within the lands to be conveyed that contain measurable log volume and develop all information (species and grade) with respect to those trees necessary to apply the stumpage tables developed by the department of revenue pursuant to RCW 84.33.091; this includes volume by species and grade sufficient to apply the department of revenue stumpage tables in WAC 458-40-640, 458-40-650 and 458-40-660 (1) and (2). The department will

provide the cruise data to the landowner; within thirty days thereafter, the landowner shall advise the department whether the cruise results are acceptable. The landowner or the department may, at their option, perform a check cruise.

- (7) Compensation for conveyances. RCW 76.09.040(3) specifies the compensation the department shall pay for purchases of qualifying CMZ lands, unless the landowner chooses to donate the property in fee or donate a conservation easement.
- (a) Fee interests. For conveyances of fee interests, the department shall pay for both the land value and the timber value, as determined in this subsection. The land value component shall be the acreage of qualifying CMZ lands to be conveyed multiplied by the average per acre value of all commercial forest land in Western Washington or the average for Eastern Washington, whichever average is applicable to the qualifying CMZ lands. The department shall determine the Western and Eastern Washington averages based on the land value tables established by RCW 84.33.120 and revised annually by the department of revenue (see WAC 458-40-540). The timber value component of the compensation shall be based on the cruise volume multiplied by the appropriate department of revenue stumpage values from the stumpage value table for the applicable stumpage value area and hauling distance zone. The stumpage value tables to be applied are those found in WAC 458-40-660(2). Except as provided in (c) of this subsection, the tables applied shall be those in effect as of the date the application under this section is submitted to the department by the landowner.
- (b) Conservation easements. Conservation easements shall be perpetual and not for a term of years. For conveyances of a conservation easement in which the landowner conveys an interest in the trees only, the compensation shall only include the timber value component, determined as set forth in subsection (7)(a) of this section. For conveyances of a conservation easement in which the landowner conveys interests in both land and trees, the compensation shall include the timber value component plus such portion of the land value component as determined just and equitable by the department.
- (c) Adjustment in compensation. Where the department does not complete its duties as required in subsections (3) through (5) of this section within the required time period or the department is unable to complete the acquisition because of a lack of funds or other reason, the landowner has the option to require that the department recompute the compensation based on the most recently published land value and stumpage value tables.
- (8) **Alternative management options.** In any circumstance where qualifying CMZ lands are not acquired by the department in fee or through a conservation easement, the landowner may elect to develop an alternative management option for the lands in cooperation with the department, other agencies and affected Indian tribes.

**WAC 222-23-025 Priorities for conveyances-Use of lands conveyed.**

- (1) Priorities for conveyances. The legislature recognized, in RCW 77.85.180(4), that the adoption of forest practices rules consistent with the forests and fish report will impose substantial burdens on forest landowners. The purpose of this program, which will be administered by the department, is to compensate landowners and provide for ecological protection and fisheries enhancement. The department shall prioritize applications under this section based on the following criteria (not in priority order): Order of receipt, ecological value (including importance to salmonids, water quality benefits, quality of habitat, site significance, etc.), and immediacy of need. If funding is or becomes unavailable to

consummate a conveyance with respect to otherwise qualifying CMZ lands, the application may (at the landowner's option) be kept on file at the department pending the future availability of funding. The department will consult with representatives of affected Indian tribes, department of fish and wildlife, and department of ecology as necessary for technical expertise. The board will include, in its reports to the legislature required in RCW 76.09.380, a review of this program with recommended amendments, as necessary, to accomplish the goals of this program.

- (2) Use and management of lands and easement interests acquired under riparian open space program. Subject to the exceptions set forth in this subsection (or as otherwise provided in the conveyance or easement documents), the lands conveyed or subject to the conservation easements under this chapter shall be managed by the department only in a manner necessary for ecological protection or fisheries enhancement. The conveyance of lands under the riparian open space program shall not create a right of public access to the conveyed lands across adjoining or other lands owned by the landowner conveying property or an easement under the riparian open space program.
- (3) Transfer of fee or easement interest or management responsibility. After acquisition of a fee or easement interest in qualifying CMZ lands, the department may transfer its interest in such lands by a recorded instrument to another state agency, a local government within which the lands lie, or a private nonprofit nature conservation corporation (as defined in RCW 64.04.130). Alternatively, the department may contract with one or more of the foregoing entities to exercise the department's management authority over the qualifying CMZ lands. Any such contract will include provisions fully advising the contracting party of the rights of the landowner under this chapter and the conveyance instrument. The department shall notify the landowner of any transfer of its interest in the qualifying CMZ lands or any transfer of management responsibilities over those lands, provided that failure to so notify the landowner shall not affect the validity of the transfer.

**WAC 222-23-030 Conveyance forms and procedure.**

- (1) **Fee interest.** Conveyance of a fee interest in qualifying lands shall be by deed with limited warranties. Deeds will include terms reasonably necessary and appropriate to the circumstances of the particular lands involved and shall be in a form acceptable to the department and the landowner. Prior to closing, the landowner shall procure a title report or title history for the lands being conveyed, provided that in the case of qualifying CMZ land being donated to the department, the department shall pay the cost of the report.
- (2) **Conservation easement.** Conveyances of a conservation easement shall be through execution by the landowner and the department of a conservation easement in a form acceptable to the department and the landowner. The easement will include terms reasonably necessary and appropriate to the circumstances of the particular lands involved. Prior to closing, the landowner shall procure a litigation guarantee or title history from a title company, provided that in the case of an easement being donated to the department, the department shall pay the cost of the guarantee or other report.
- (3) **Description standards.** The description of the qualifying lands being conveyed shall be a legal land survey description or, if a survey is not being performed, the description shall include the township, range, section, and legal subdivision, and utilize a map at a scale of 1:400 indexed either to one legal land survey point or two geopositional system points plus a GPS traverse of the boundary between the CMZ and the RMZ core area, tied to one legal land survey point or two geopositional system points, or other description acceptable to the department.

- (4) Closing and recording. Upon execution of the conveyance documents and other documents required for closing, the department shall pay any compensation owed to the landowner and record the conveyance documents. The department shall pay the recording fees. No compensating taxes under chapters 84.33 and 84.34 RCW shall be owed. Any real estate excise tax owed shall be paid by the landowner conveying the property or easement.